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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SHEDRICK L. OATIS,

Defendant and Appellant.

B271251

(Los Angeles County
Super. Ct. No. NA024154)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Shedrick L. Oatis appeals from an order denying his petition to recall his sentence and for resentencing under Proposition 36. We affirm the order of denial.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, Oatis was charged with a single count of possession of a firearm by a felon. (Pen. Code, § 12021, subd. (a)(1), now found at § 29800, subd. (a)).¹ At trial, Peter Salazar testified that while playing in a tree house in his backyard, he heard several gunshots. From his tree house, Salazar saw defendant shooting at a tire. Defendant then turned around and pointed the gun at Salazar. Michael Winters, who lived in the neighborhood, testified that he heard four gunshots, followed by a three more gunshots, and saw defendant and two other Black men coming from an alley. About 30 minutes later, Winters identified defendant at a field identification lineup; he also identified defendant in court.

The jury found defendant guilty of the section 12021 allegation. In a bifurcated proceeding, it also found that he had suffered two prior serious or violent felony convictions. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court imposed a sentence of 25 years to life under the Three Strikes law. The conviction was affirmed on appeal. (*People v. Oatis* [Dec. 4, 1996, B098100] nonpub. opn.)

In November 2012, the voters approved Proposition 36, which amended the Three Strikes law by limiting the imposition of an indeterminate life sentence to those defendants whose third felony is defined as serious or violent under sections 667.5 or 1192.7. The initiative allowed those serving a life sentence for a third felony that is not defined by those sections as serious or violent to petition to recall their sentence and for resentencing. (§ 1170.126, subd. (b).)

¹ All further undesignated statutory references are to the Penal Code.

In March 2013, defendant petitioned to recall his sentence and for resentencing under Proposition 36. (§ 1170.126.) The trial court conducted an eligibility hearing at which it considered the pleadings, trial transcript, and arguments of both counsel. At the conclusion of the hearing, the court denied the petition on the ground that defendant was “armed with a firearm” during his current offense, and thus was statutorily ineligible for resentencing. (§§667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2).) This timely appeal followed.

DISCUSSION

By its terms, Proposition 36 precludes the resentencing of a defendant who, during the commission of the current offense, “used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).) Defendant argues that the armed-with-a-firearm exclusion applies only if there is some other offense—other than mere possession of a firearm—to which the arming was tethered. He contends that because a firearm possession offense has no underlying felony, he could not have been armed with a firearm during the commission of the current offense.

The phrase “armed with a firearm” has been “statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (E.g., § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing § 12022].)” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); see *People v. Brimmer* (2014) 230 Cal.App.4th 782, 796–797 [“armed with a firearm” means having firearm available for offensive or defensive use].) We conclude the trial court properly applied the exclusionary provision in the initiative statute. Moreover, the trial testimony shows that defendant also could have been charged with brandishing a firearm at Salazar in an attempt to silence him. (§ 417, subd. (a) [brandishing a weapon is punishable as a misdemeanor].)

Several courts have rejected the contention that in order for the armed-with-a-firearm ineligibility provision to apply, “there must be an underlying felony to which the

arming is ‘tethered.’” (*People v. Hicks* (2014) 231 Cal.App.4th 275, 283.) In *Hicks*, for example, the court concluded the defendant was statutorily ineligible for resentencing due to the “temporal nexus” between the arming and the firearm possession offense.² (*Id.* at p. 284; *Osuna, supra*, 225 Cal.App.4th at pp. 1032–1033 [same]; see *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317 [prior appellate opinion showed defendant was armed during unlawful possession of firearm]; *People v. White* (2014) 223 Cal.App.4th 512, 525–526 [same].)

In *Osuna*, the court reasoned that “[a] felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public. ‘[T]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.’ [Citation.] [¶] In light of the clear evidence of voters’ intent, we reject the claims that disqualification for resentencing under Proposition 36 requires an underlying offense or enhancement to have been pled and proved, and that a conviction for possession of a firearm cannot constitute being ‘armed’ with a firearm for eligibility purposes.” (*Osuna, supra*, 225 Cal.App.4th at p. 1038; see *People v. Caraballo* (2016) 246 Cal.App.4th 936, 940–941 [because ballot materials stated that “life sentence penalties would still apply to persons whose third strike conviction ‘involved firearm possession’ or was a “gun-related” felony,” appellate court reasoned that “the voters intended to disqualify from resentencing an inmate who was vicariously armed with a firearm during the commission of the current offense”].) The conclusion that “the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that

² The Supreme Court recently granted review in *People v. Estrada* (2015) 243 Cal.App.4th 336, review granted, April 13, 2016, S232114, which cited *Hicks* for the proposition that an appellate court may rely on a prior appellate opinion in determining that the defendant was armed when he committed the offense, even though the arming enhancement had not been pleaded or proven. (243 Cal.App.4th at p. 342.) In this case, because the court was provided with the trial transcript, it was able to ascertain the facts of the offense without having to rely entirely on the prior appellate opinion.

firearm” (*Osuna, supra*, 225 Cal.App.4th at p. 1032), is consistent with the analysis contained in the Voter Information Guide for Proposition 36. (See Voter Information Guide, Gen. Elec. (Nov. 6, 2012) analysis by Legislative Analyst, at p. 48 [courts will continue “to impose life sentence penalty if third strike conviction . . . involved firearm possession”].)

Given the substantial support in the record for the determination that defendant was armed with the firearm that he possessed in violation of former section 12021, subdivision (a), we find no error in the court’s finding of ineligibility.

DISPOSITION

The order denying the petition for resentencing is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.